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15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**  
17 **WESTERN DIVISION**

18 KAMBIZ BATMANGHELICH, on  
19 behalf of himself and all others  
20 similarly situated, and on behalf of the  
21 general public,

22 Plaintiffs,

23 v.

24 SIRIUS XM RADIO, INC., a  
25 Delaware corporation, STREAM  
26 INTERNATIONAL INC., a Delaware  
corporation, and DOES 3 through 50,  
inclusive,

27 Defendants.  
28

**CASE NO.: CV 09-9190 VBF (JCx)**

**NOTICE OF UNOPPOSED  
MOTION AND UNOPPOSED  
MOTION FOR FINAL APPROVAL  
OF CLASS ACTION SETTLEMENT**

**DATE:** September 12, 2011

**TIME:** 1:30 P.M.

**COURTROOM:** 9

**JUDGE:** Hon. Valerie Baker Fairbank

**TO THE COURT AND TO ALL PARTIES:**

PLEASE TAKE NOTICE that on September 12, 2011 at 1:30 p.m., in Courtroom 9 of the above-entitled Court, located at 312 N. Spring Street, Los Angeles, California 90012, Plaintiff Kambiz Batmanghelich will, and hereby does, move this Court for an order granting final approval of the class action settlement in this Action. This motion is unopposed by Defendants.

This motion will be based on this Notice and accompanying Memorandum of Points and Authorities, the Declarations of Kenneth S. Gaines, Steven L. Miller, Scott A. Miller, Daniel F. Gaines and Stephen H. Krumm, the Declaration of Class Representative Kambiz Batmanghelich, the Declarations of Jennifer M. Keough of GCG, Inc., the Amended Stipulation of Settlement (including exhibits), all filed herewith, and on such further evidence and argument as may be presented at the hearing.

DATED: July 22, 2011

Respectfully submitted,  
GAINES & GAINES,  
A Professional Law Corporation

By: /s/ Kenneth S. Gaines  
KENNETH S. GAINES  
DANIEL F. GAINES  
Attorneys for Plaintiff Kambiz  
Batmanghelich and Class Counsel

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Plaintiff Kambiz Batmanghelich, on behalf of himself and others similarly situated, and Defendants Sirius XM Radio Inc. (“Sirius”) and Stream International Inc. (“Stream”) (collectively, “Defendants”), seek final approval of their class action settlement. This motion follows a successful settlement administration authorized by the Court’s March 14, 2011 Order Granting Preliminary Approval of the Settlement. *See* Ex. A to the Declaration of Kenneth S. Gaines (“Gaines Decl.”) (Docket No. 65).

Subject to Court approval, Plaintiff has settled his claims and those of class members from California, Nevada, Maryland, Florida, and New Hampshire for total consideration of \$9,480,000 (which includes all settlement payments, settlement administration, Class Counsel’s fees and costs, and the representative Plaintiff’s service payment). No portion of the settlement payment shall revert to Defendants.

By a separate motion filed concurrently, Plaintiff moves for an award of attorneys’ fees and costs, approval of the claims administrator’s fees, and approval of the service payment to be paid to the Class Representative.

Following a comprehensive notice program, approximately 15,157 class members have submitted valid and timely claims.<sup>1</sup> Based on the valid claims submitted thus far, if the Settlement receives final approval, approximately 8,006 California class members shall receive settlement payments of approximately \$734 each and approximately 7,151 class members residing in Nevada, Maryland, Florida and New Hampshire shall be paid approximately \$146 each. Supplemental Declaration of Jennifer M. Keough Regarding Claims Administration (“Keough Claims Decl.”) at ¶ 2; Gaines Decl. at ¶ 23. These are substantial cash payments in relation to the harm alleged.

---

<sup>1</sup> Class Members have 180 days from the date of preliminary approval – September 10, 2011 – to submit a claim form.

1 Notably, of over one million potential class members, only 32 individuals have  
 2 opted-out of the settlement, and through the date of filing of this motion, not one  
 3 class member has submitted an objection.<sup>2</sup> Keough Claims Decl. at ¶¶ 3-4.

4 The proposed Settlement satisfies all of the criteria for final settlement  
 5 approval under federal law because it is fair, adequate, and reasonable. *See Churchill*  
 6 *Village, L.L.C. v. GE*, 361 F.3d 566, 575-76 (9th Cir. 2004). The overwhelmingly  
 7 positive response of the Class Members to the Settlement – including a substantial  
 8 participation rate, minimal opt-outs, and zero objections – provides strong support  
 9 that final settlement approval is appropriate.

10 Because the Settlement provides a substantial benefit to all Class Members and  
 11 will protect the privacy interests of all persons who engage in telephone  
 12 communications with Defendants in the future, Plaintiff requests that the Court  
 13 approve the Settlement as fair, adequate, and reasonable, and enter judgment  
 14 accordingly.

## 15 **II. FACTUAL BACKGROUND**

16 On November 10, 2009, Plaintiff filed a Class Action Complaint against Sirius  
 17 in the Los Angeles Superior Court, which was removed pursuant to the Class Action  
 18 Fairness Act, 28 U.S.C. § 1332(d). In his Complaint (later amended), Plaintiff  
 19 alleges Sirius surreptitiously recorded telephone calls without its customers'  
 20 knowledge or consent. The original Complaint alleged a violation of California Penal  
 21 Code, section 630 *et. seq.*, among other things, and sought statutory damages  
 22 pursuant to California Penal Code section 637.2 of \$5,000 for each unlawful  
 23 recording. Gaines Decl. at ¶¶ 7-8.

24  
 25  
 26  
 27 <sup>2</sup> The opt-out deadline was June 26, 2011. Class Members had until August 5, 2011  
 28 to submit an objection to the Settlement.

1           Shortly after removal, Sirius filed a third party claim against Stream, a  
2 company which handled some of Sirius' call center operations. Stream was also  
3 added as a defendant by Plaintiff. Gaines Decl. at ¶ 9.

4           Stream filed a cross-claim against Sirius; Sirius and Stream have subsequently  
5 dismissed their claims against each other. *Id.*

6           Plaintiff filed the Third Amended Complaint ("TAC") on April 23, 2010,  
7 asserting claims for invasion of privacy (violations of California Penal Code section  
8 630 *et. seq.*) and negligence. In the TAC, Plaintiff sought statutory damages pursuant  
9 to Penal Code section 637.2, injunctive relief pursuant to Penal Code 637.2(b), and  
10 compensatory damages. Gaines Decl. at ¶ 10.

11           Plaintiff engaged in extensive formal and informal discovery, including  
12 multiple depositions in Los Angeles and Boston, multiple sets of interrogatories,  
13 requests for admissions, and numerous document production requests. Plaintiff's  
14 counsel has reviewed thousands of documents produced in connection with the  
15 litigation, engaged in extensive research and inquiry with respect to the claims  
16 asserted in the Action, and have vigorously litigated the matter on behalf of the class,  
17 first in contemplation of a class certification motion and, subsequently, in connection  
18 with the settlement. Gaines Decl. at ¶ 11.

19           The facts are clear. Sirius hired Stream to handle some of its call center  
20 operations; although Defendants recorded customers' calls in many cases, they failed  
21 to notify customers that their telephone conversations were being recorded. In fact,  
22 within days of filing suit, Defendants promptly modified their practices and began  
23 notifying all customers that their telephone calls were being recorded. Gaines Decl.  
24 at ¶ 12.

25           Plaintiff steadfastly maintained the viability and likely success of his claims on  
26 a classwide basis, while Defendants proffered numerous defenses to both class  
27 certification and liability. Following extensive discovery and assessment of the risks  
28 involved in further litigation, the Parties engaged in pre-certification settlement

1 discussions, which included a formal mediation session on May 12, 2010 with the  
2 Honorable Dickran Tevrizian, United States District Judge, Retired. The mediation  
3 session did not result in a settlement. Gaines Decl. at ¶ 14.

4 Following further settlement discussions, together with the continued  
5 participation and recommendations of Judge Tevrizian, on June 14, 2010 an  
6 agreement in principle was reached regarding the framework for basic settlement  
7 terms. Following extended negotiations, the original Stipulation of Settlement, which  
8 provided for a 12 state settlement class, was entered into on October 25, 2010.  
9 Gaines Decl. at ¶ 15.

10 The Parties moved the Court for preliminary approval of their settlement on  
11 November 29, 2010 (*see* Docket No. 50), which the Court tentatively denied but  
12 permitted the Parties to submit supplemental briefing in support of their contention  
13 that a 12-state settlement class could be properly certified under Rule 23 (Docket No.  
14 54 and 55). Following further briefing (Docket No. 56), the Court issued a tentative  
15 ruling, denying preliminary approval. Gaines Decl. at ¶ 16.

16 After the tentative ruling was issued, the Parties further negotiated settlement  
17 terms to include a narrow five state class. At the continued hearing on January 31,  
18 2011, the Parties presented argument in support of this revised five state settlement  
19 class, comprised of residents from California, Nevada, Maryland, Florida, and New  
20 Hampshire. The Court took the matter under submission and subsequently issued a  
21 ruling denying Plaintiff's motion as filed but instructing Plaintiff to submit a renewed  
22 motion for preliminary approval with revised settlement documents reflecting the  
23 proposed five state settlement class. (Docket No. 59). *Id.*

24 Following further briefing, the Court granted preliminary approval to the  
25 Amended Stipulation of Settlement, which embodies a comprehensive resolution of  
26 all claims encompassed in Plaintiff's Fourth Amended Complaint for members of the  
27 five state settlement class. *Id.* The Court's preliminary approval order is attached to  
28 the Kenneth S. Gaines Declaration as Exhibit "B."

### 1     **III.     SUMMARY OF THE SETTLEMENT TERMS**

2           A copy of the Amended Settlement Agreement and Release is attached and  
3 marked Exhibit “A” to the Declaration of Kenneth S. Gaines submitted herewith. Its  
4 significant terms are set forth below.

#### 5           **A.     The Settlement Class**

6           The Settlement Class is defined as:

7           All persons in California, Florida, Maryland, Nevada, and New  
8 Hampshire (the “Covered States”) who (1) placed one or more telephone  
9 calls to Sirius Satellite Radio between July 13, 2006 and November 17,  
10 2009, spoke with a representative on behalf of Sirius Satellite Radio, and  
11 were not provided with notice that the call may be recorded or  
12 monitored; and/or (2) received one or more telephone calls from Sirius  
13 Satellite Radio between July 13, 2006 and February 1, 2010, spoke with  
14 a representative on behalf of Sirius Satellite Radio, and were not  
15 provided with notice that the call may be recorded or monitored; and/or  
16 (3) placed one or more telephone calls to XM Satellite Radio between  
January 25, 2009 and November 17, 2009, to discuss music royalty fees  
or canceling their XM Satellite Radio subscription, spoke with a  
representative on behalf of XM Satellite Radio, and were not provided  
with notice that the call may be recorded or monitored.

17          Stip. at ¶ 1(f). The scope of the Settlement Class and release reach back to July 13,  
18 2006, the date on which the California Supreme Court decided *Kearney v. Solomon*  
19 *Smith Barney*, (2006) 39 Cal.4th 95 (resolving choice of law issues implicated by Cal.  
20 Penal Code section 630 *et. seq.*).

#### 21           **B.     Settlement Consideration**

22          Stream (on its own behalf and on behalf of Sirius) will cause its insurer to pay  
23 a total of Nine Million Four Hundred Eighty Thousand Dollars (\$9,480,000.00) to  
24 fund the Common Fund to be disbursed as follows:<sup>3</sup>

25  
26 <sup>3</sup> In addition, without admitting liability, Defendants have agreed to comply with the notice  
27 and consent requirements of Cal. Penal Code §§ 630 *et seq.*, Fla. Stat. ch. 934.03 *et seq.*,  
28 Md. Code Ann., Cts. & Jud. Proc. § 10-402 *et seq.*, Nev. Rev. Stat. Ann. § 707.900 *et seq.*,  
and N.H. Rev. Stat. Ann. § 570-A:2-I *et seq.*, including providing notification to their  
customers that their telephone calls may be recorded or monitored. Stip. at ¶ 4.

## 1. Payment to Plaintiff and Class Members

The Settlement Amount, which is the Common Fund less all attorneys' fees and costs and costs of class notice and claims administration, is approximately Seven Million Dollars (\$7,000,000.00), the entirety of which must be paid out by Defendants. Stip. at ¶ 1(u). After subtracting the Plaintiff's service payment,<sup>4</sup> the remainder will be distributed to Class Members who have submitted valid and timely claims, such that Class Members who reside in California shall be paid five times the amount to be paid to all other states, up to \$5,000 each for California residents and up to \$1,000 each for residents of each other state. Stip. at ¶¶ 3.3-3.5. If less than the entire Settlement Amount is claimed, or any settlement checks remain uncashed for more than 120 days, then such funds shall be paid to a *cy pres* recipient. Stip. at ¶ 11. The cost of settlement administration was estimated to be no more than \$450,000, which shall be paid from the Common Fund.<sup>5</sup>

## 2. Attorneys' Fees and Costs to Class Counsel

The Settlement provides that Plaintiff's counsel may request up to Two Million Dollars (\$2,000,000) as an award of attorneys' fees, representing approximately 21% of the total settlement consideration and to be paid from the Common Fund. Further, the Settlement provides that Plaintiff's counsel may request up to \$20,000 in reimbursement of litigation costs actually and reasonably incurred during the course of this litigation. Any portion of the attorneys' fees and costs not requested and/or not awarded shall be added to the Settlement Amount, for distribution to Class Members. Stip. at ¶ 3.7.

//

<sup>4</sup> The Settlement provides that Plaintiff may request a service payment of up to \$10,000, which is intended to compensate him for 1) his damages recoverable as a result of the claims alleged in the TAC, and 2) the time, expense, and risk he has expended in bringing this lawsuit for the benefit of Class Members. Stip. at ¶ 3.6.

<sup>5</sup> As discussed in the accompanying motion, the notice expenses exceeded the parties' estimate.

1           **C.     The Release by Plaintiff and Class Members**

2           The release, to which all Class Members (except for those who submit a valid  
3 and timely request for exclusion) will be bound, in essence releases Defendants from  
4 any and all claims related to the events that are the subject of this Action, in particular  
5 claims related to the recording and/or monitoring of telephone calls. The release  
6 includes a waiver of Cal. Civil Code section 1542 (and any similar statute in the Class  
7 Members' state of residence) with respect to these released claims. Stip. at ¶ 14.

8           **IV.     THE COURT-APPROVED NOTICE PROGRAM**

9           The notice program approved by the Court in its March 14, 2011 preliminary  
10 approval order was administered flawlessly by GCG, Inc., the Court-appointed  
11 settlement administrator chosen by the parties and confirmed by the Court ("GCG").  
12 A comprehensive explanation of the notice program and its success – including its  
13 compliance with the Settlement Agreement and the Court's order – is detailed in the  
14 Declaration of Jennifer M. Keough Regarding Notice Dissemination previously filed  
15 with the Court (Docket No. 70) ("Keough Notice Decl.").

16           According to GCG, of 1,765,594 potential Class Members (based on Sirius'  
17 customer records), approximately 50% ultimately received notice by e-mail after  
18 nearly 72% of transmitted e-mails were successfully delivered.<sup>6</sup> Approximately 16%  
19 of Class Members successfully received notice by postcard through U.S. Mail.  
20 Additional notices were mailed to potential Class Members who requested them  
21 from GCG or Class Counsel. Keough Notice Decl. at ¶¶ 6-10.

22           In accordance with the Court-approved notice plan, notice was published in a  
23 quarter page advertisement in U.S.A. Today on April 26, 27, and 28, 2011 in  
24 editions circulated in California, Florida, Maryland, Nevada, and New Hampshire.  
25 Keough Notice Decl. at ¶ 11.

26           GCG maintained a website, [www.CallRecordingClassAction.com](http://www.CallRecordingClassAction.com),

27  
28           <sup>6</sup> Sirius had multiple e-mail addresses on file for many potential Class Members.

1 commencing on April 22, 2011 and running through the present. It will remain on  
 2 the internet until the settlement is fully concluded. Tens of thousands of individuals  
 3 have visited the site. Keough Notice Decl. at ¶ 12.

4 Finally, GCG maintained an IVR (interactive voice response) system and  
 5 utilized live operators and a live call-back system to handle class member inquiries.  
 6 It has fielded over 2,500 calls. Keough Notice Decl. at ¶ 13. Moreover, Class  
 7 Counsel have responded to a substantial number of Class Member inquiries,  
 8 including fielding questions about the Settlement, the relevant laws, and who  
 9 qualifies to participate. Gaines Decl. at ¶ 20.

## 10 **V. ARGUMENT**

11 The law favors settlement, particularly in class actions and other complex  
 12 cases where substantial resources can be conserved by avoiding the time, cost and  
 13 rigors of formal litigation. *See 4 Newberg* § 11.41 (and cases cited therein);  
 14 *Churchill Village, supra*, 361 F.3d at 576 (noting “strong judicial policy” favoring  
 15 settlements, provided they were reached through arms-length, non-collusive  
 16 negotiations); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)  
 17 (endorsing the trial court’s “proper deference to the private consensual decision of  
 18 the parties” when approving a settlement); *Franklin v. Kaypro*, 884 F.2d 1222, 1227  
 19 (9th Cir. 1989) (“Litigation settlements offer parties and their counsel relief from the  
 20 burdens and uncertainties inherent in trial...[t]he economics of litigation are such  
 21 that pretrial settlement may be more advantageous for both sides than expending the  
 22 time and resources inevitably consumed in the trial process.”); *Van Bronkhorst v.*  
 23 *Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (“there is an overriding public  
 24 interest in settling and quieting litigation. This is particularly true in class action suits  
 25 which are now an ever increasing burden to so many federal courts and which  
 26 frequently present serious problems of management and expense.”)

27 //

28 //

**A. The Class Members Received the Best Practicable Notice**

To protect the rights of absent class members, the parties must provide class members with the best notice practicable of a potential class action settlement. Fed. R. Civ. P. 23(c)(2); *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-12; *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 175 (individual notice must be sent to all class members who can be identified through reasonable efforts); *Mullane v. Central Hanover Bank & Garretson Company* (1950) 339 U.S. 306, 314 (best practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”). The content and method of the notice should be designed to apprise the class members of the terms of the proposed settlement and of the class members’ rights regarding the settlement. *See Mullane, supra*, 339 U.S. at 314; *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.* (E.D. Pa. 1970) 323 F. Supp. 364, 378.

The Court is vested with broad discretion in fashioning an appropriate notice program. *See California Civil Code* § 1781; *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 973-74.

The various forms of notice approved by the Court – by e-mail, postcard, and though the website – met these requirements: it identified the Parties and described the lawsuit, the Class, the settlement amount, the proposed method for distribution of the settlement consideration, the amount proposed to be paid as a service payment to the named Plaintiff, and the requested amount for attorneys’ fees and costs. *See* Keough Notice Decl., Exs. A, B, C, and E. The Notice described the proposed Settlement with enough specificity to allow each Class Member to make an informed choice whether to accept and participate in it. It also explained how and when Class Members may object to or opt out of the Settlement. Finally, the Notice provided the schedule for the hearing on final approval of the Settlement and informed Class Members how to obtain additional information about the Settlement.

1           The California Supreme Court has held that notice is appropriate if it has a  
 2           “reasonable chance of reaching a substantial percentage of the class members....”  
 3           *Cartt, supra*, 50 Cal.App.3d at 974. Here, notice was mailed or e-mailed to each  
 4           individual Class Member at that Class Member’s last known e-mail or physical  
 5           address. In the end, a substantial percentage of potential Class Members received  
 6           individual notice. The publication notice effectively provided notice to many more  
 7           potential Class Members. *See* Keough Notice Decl. at ¶ 11. As Notice actually  
 8           reached the vast majority of potential Class Members and apprised them of all  
 9           pertinent information regarding the Settlement, under applicable law, the Notice  
 10          given to Class Members was more than adequate.

#### 11           **B. Final Settlement Approval is Warranted**

12          The law favors settlement, particularly in class actions and other complex  
 13          cases where substantial resources can be conserved by avoiding the time, cost, and  
 14          rigors of formal litigation. *See 4 Newberg on Class Actions* 4th (4th ed. 2002) §  
 15          11.41 (and cases cited therein); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268,  
 16          1276 (9th Cir. 1992); *Van Bronkhorst, supra*, 529 F.2d at 950. These concerns apply  
 17          with particular force in a case such as this, where novel issues of law in untested,  
 18          rarely litigated areas, are implicated.

19          Pursuant to Federal Rule of Civil Procedure 23(e), the Court must approve any  
 20          proposed class action settlement. Court approval of class action settlements requires  
 21          the following steps:

- 22           (1) Preliminary approval of the proposed settlement at a preliminary  
 23           hearing;
- 24           (2) Dissemination of mailed and/or published notice of the Settlement to all  
 25           affected Class Members; and
- 26           (3) A “formal fairness hearing,” or final settlement approval hearing, at  
 27           which Class Members may be heard regarding the Settlement, and at  
 28

1 which evidence and argument concerning the fairness, adequacy, and  
2 reasonableness of the Settlement may be presented.

3 *See Manual for Complex Litigation, Fourth* (4th ed. 2004) § 21.632-34.

4 The first two steps of this process are now complete. The first step was  
5 completed on March 14, 2011, when this Court entered an order granting  
6 preliminary approval of the Settlement. As detailed in the Keough Notice and  
7 Claims Declarations, the Notice program was engaged in accordance with the  
8 Court's preliminary approval order and conformed with accepted standards in notice  
9 administration. This is, perhaps, best evidenced by the strong rate of response to the  
10 Settlement by Class Members. Keough Claims Decl. at ¶ 23.

11 The last step in the class action settlement approval process is the final  
12 approval hearing, at which the Court shall finally conclude whether the Settlement is  
13 fair, adequate, and reasonable. Fed. R. Civ. P. 23(e)(2). At the final approval  
14 hearing Class Members will have the opportunity to be heard regarding the  
15 Settlement, and Class Counsel will present evidence and argument in support of the  
16 Settlement. At the conclusion of the final approval hearing the Court will decide  
17 whether to grant final approval of the Settlement and whether to enter a final order  
18 and judgment thereon.

### 19 **1. Each of the Relevant Criteria Supports Final Approval**

20 In the Ninth Circuit, a court must balance the following factors to determine  
21 whether a class action settlement is fair, adequate, and reasonable:

- 22 (1) the strength of the plaintiff's case;
- 23 (2) the risk, expense, complexity, and likely duration of further litigation;
- 24 (3) the risk of maintaining class action status throughout the trial;
- 25 (4) the amount offered in settlement;
- 26 (5) the extent of discovery completed and the stage of the proceedings;
- 27 (6) the experience and views of counsel;
- 28

1 (7) the presence of a governmental participant; and

2 (8) the reaction of the class members to the proposed settlement.

3 *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *accord Linney*  
 4 *v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998); *Hanlon, supra*, 150  
 5 F.3d at 1026. "In addition, the settlement may not be the product of collusion among  
 6 the negotiating parties." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th  
 7 Cir. 2000). These factors are not exclusive, and one factor may deserve more weight  
 8 than the others depending on the circumstances. *Torrise, supra*, 8 F.3d at 1376. In  
 9 some instances, "one factor alone may prove determinative in finding sufficient  
 10 grounds for court approval." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221  
 11 F.R.D. 523, 525-26 (citing *Torrise, supra*, 8 F.3d at 1376).

12 "The involvement of experienced class action counsel and the fact that the  
 13 settlement agreement was reached in arm's length negotiations, after relevant  
 14 discovery had taken place create a presumption that the agreement is fair." *Linney v.*  
 15 *Cellular Alaska P'ship*, Nos. C-96-3008 DLJ, C-97-0203 DLJ, C-97-0425 DLJ, C-  
 16 97-0457 DLJ, 1997 WL 450064, \*5 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d at  
 17 1234.

18 **a. The Strength of Plaintiff's Case Turns on an**  
 19 **Untested Area of Law Creating Significant Risks**  
 20 **to Plaintiff and Class Members**

21 There is little published case law relating to the application of *Penal Code* §  
 22 632 in the class action context, including whether this claim is properly maintainable  
 23 in class action form. The annihilating damage defense to certification, which still  
 24 could apply here, is a substantial risk inherent in continued litigation through an  
 25 opposed certification motion. Several courts in the Central District of California have  
 26 denied class certification of cases when the potential damage exposure following  
 27 certification could potentially be so large that it would be "annihilating" to the  
 28 Defendant. *See Najarian v. Avis Rent a Car Sys.*, No. CV 07-0588, 2007 U.S. Dist.

1 LEXIS 59932 (C.D. Cal. June 13, 2007); *Najarian v. Charlotte Rousse, Inc.*, No. CV  
 2 07-0501, 2007 U.S. Dist. LEXIS 59879 (C.D. Cal. June 12, 2007); *Soualian v. Int'l*  
 3 *Coffee & Tea LLC*, No. CV 07-0502, 2007 US. Dist. LEXIS 44208 (C.D. Cal June  
 4 11, 2007); *Spikings v. Cost Plus Inc.*, No. CV 06-8125, 2007 U.S. Dist. LEXIS 44214  
 5 (C.D. Cal. May 25, 2007); *Legge v. Nextel Commc'ns, Inc.* No. CV 02-8676, 2004  
 6 U.S. Dist. LEXIS 30333 (C.D. Cal. June 25, 2004). *Cf. Bateman v. American Multi-*  
 7 *Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010) (leaving open the possibility that the  
 8 annihilating damages doctrine could bar certification). *See* Gaines Decl. at ¶ 26.

9 Defendants also opposed certification on other grounds, including the  
 10 difficulty of ascertaining the identity of class members without listening to each and  
 11 every telephone call. Gaines Decl. at ¶ 28.

12 Moreover, during the pendency of this lawsuit, Defendants proffered  
 13 numerous arguments in favor of their position that they face no liability – or, at most,  
 14 minimal potential liability – including a proffered business use exception in section  
 15 632. *Id.*

16 Plaintiff maintains that he would succeed at trial on a classwide basis.  
 17 Defendants, on the other hand, contend otherwise. Simply, there is uncertainty  
 18 which supports that the Settlement as a fair and appropriate compromise. Gaines  
 19 Decl. at ¶¶ 24-31.

20 **b. The Complexity, Expense and Likely Duration of**  
 21 **Continued Litigation Weighs in Favor of Final**  
 22 **Approval**

23 In determining whether a settlement warrants final approval, Courts consider  
 24 the complexity, expense, and likely duration of the litigation in the absence of  
 25 settlement. *See Officers for Justice v. Civil Service Com'n of City and County of San*  
 26 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). In applying this factor, a court should  
 27 weigh the benefits of the settlement against the expense and delay involved in  
 28

1 achieving an equivalent or more favorable result at trial. *See Young v. Katz*, 447 F.2d  
2 431, 433 (5th Cir. 1971).

3 Consumer class action cases are expensive and time-consuming to litigate.  
4 This case presents a more difficult situation than most, given the lack of legal  
5 authority surrounding the interpretation of the Penal Code sections at issue in the  
6 factual context of this case. The presence of two potentially-liable defendants – and  
7 two well-respected law firms representing them – would increase the potential  
8 complexity, expense, and duration of continued litigation if a settlement were not  
9 reached. Gaines Decl. at ¶¶ 34-36.

10 The Settlement also avoids the need for a contested class certification motion  
11 that would be time consuming and costly for all parties. In addition, if the Court  
12 were to deny such a motion for class certification, Class Members would be left  
13 without a group remedy, and the issues presented here – relatively small individual  
14 claims from the onset – would need to be litigated individually in a piecemeal,  
15 costly, and time-consuming fashion. The Settlement also avoids a lengthy trial or  
16 trials that likely would have involved testimony by numerous witnesses and experts.  
17 Gaines Decl. at ¶¶ 34-37.

18 Extensive, complex litigation will also result in substantial financial risk to  
19 Class Members. Class actions are expensive to prosecute and costs – many of which  
20 are not recoverable in the event Plaintiff was to prevail at trial – can increase  
21 exponentially as litigation progresses. Efficient settlement here at a relatively early  
22 stage of litigation means a larger portion of the Settlement funds are paid out to  
23 Class Members. Gaines Decl. at ¶¶ 35-36.

24 Even if Plaintiff prevailed on his class claims at trial, he faced the risk that the  
25 Court would reduce any potential damage award through its equitable powers. *See*  
26 *Kearney, supra*, 39 Cal.4th 95 (wherein the Supreme Court applied its equitable  
27 powers to reduce substantial statutory damages to zero). Gaines Decl. at ¶¶ 29-30.

1 **c. The Risk of Maintaining Class Action Status Through**  
 2 **Trial**

3 If Plaintiff were to succeed on his class certification motion, the risk is always  
 4 present that a class could later be decertified based on new law or facts which arise  
 5 during the litigation. Settlement at this juncture avoids this risk. Gaines Decl. at ¶  
 6 37.

7 **d. The Value of the Settlement Favors Final Approval**

8 Ultimately, a settlement should stand or fall on the adequacy of its terms. *In re*  
 9 *Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981). This  
 10 matter presents a unique factual pattern and the Settlement reflects an excellent  
 11 compromise. The basis of Class Members' claims are statutes which prohibit the  
 12 recording of telephone conversations without the consent of all parties to the  
 13 conversation. Gaines Decl. at ¶¶ 8, 10. The California Penal Code provides for fixed  
 14 statutory damages of \$5,000 per occurrence (*California Penal Code* § 637.2). The  
 15 laws of Nevada, Florida, Maryland, and New Hampshire each provide for minimum  
 16 statutory damages of \$1,000 (or \$100 a day for each day of violation, whichever is  
 17 higher), punitive damages, and the recovery of attorneys' fees and costs.<sup>7</sup>

18 Based upon the discovery completed thus far and the nature of the claims  
 19 alleged, neither Plaintiff Batmanghelich, nor any other Class Member, has suffered  
 20 actual damages. In fact, it is suspected that few – if any – Class Members even  
 21 realize they have been subject to the harm alleged on their behalf. Based on this  
 22 analysis, whatever Class Members receive will be nothing short of a windfall in  
 23 exchange for the release of claims which they likely do not know they have. Gaines  
 24 Decl. at ¶ 24, 33.

25  
 26  
 27 <sup>7</sup> See Fla. Stat. Ann. § 934.03(1) et seq. (Florida); Md Cts. & Jud. Proc. Code Ann. § 10-  
 28 402(a) et seq. (Maryland); Nev. Rev. Stat. § 200.620 et seq. (Nevada); NH Rev. Stat. Ann. §  
 570-A:2 et seq. (New Hampshire).

1           However, the purpose of the relevant laws – to discourage the surreptitious  
 2 recording of telephone calls – will be advanced by this Settlement. The Defendants  
 3 have not only changed their business practices by agreeing not to record telephone  
 4 calls in the future without providing notice of recording (Stip. at ¶ 4), but they are  
 5 paying a Common Fund of \$9,480,000 to compensate Class Members. Stip. at ¶ 1(l);  
 6 Gaines Decl. at ¶ 25.

7           Considering the risk that the Class would not be certified and that Plaintiff  
 8 would not succeed at trial (or that a substantial judgment in the class' favor would be  
 9 reduced after trial), the present settlement represents an excellent compromise of  
 10 Plaintiff's claims. Gaines Decl. at ¶¶ 6, 24-33; *see* Motion for Preliminary Approval  
 11 of Class Action Settlement (Docket No. 50), pp. 12-15. Class Counsel firmly  
 12 believes that the proposed resolution of these claims is in the best interest of the  
 13 Settlement Class. *Id.*

14           Accordingly, the value of the Settlement – in both monetary and non-  
 15 monetary terms – justifies final approval of the Settlement.

16                           **e. Disclosure of Documents and Data Demonstrating the**  
 17                           **Strengths and Weaknesses of this Action was**  
 18                           **Completed Prior to Entering into the Settlement**

19           The extent of discovery that has been completed and the stage of the litigation  
 20 are factors that courts consider in determining the fairness of a settlement. *See Dunk*  
 21 *v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); *see also Clark v. American*  
 22 *Residential Services, LLC*, 175 Cal.App.4th 785 (2009). This Settlement was  
 23 entered into just prior to the filing of a class certification motion which would  
 24 effectively be dispositive of the class claims. The Parties exchanged substantial  
 25 discovery in anticipation of this motion – including multiple depositions,  
 26 interrogatories and requests for admission, and thousands of documents. The Parties  
 27 exchanged further informal data in connection with their mediation and subsequent  
 28 negotiations. The Parties also apprised each other of their respective factual

1 contentions, legal theories, and defenses. The Parties negotiated the proposed  
 2 Settlement with ample knowledge of the strengths and weaknesses of their case.  
 3 Gaines Decl. at ¶¶ 11-15.

4 The Parties engaged in extensive good-faith, arms-length negotiations,  
 5 including a mediation session conducted before an experienced mediator and  
 6 subsequent extended settlement discussions that stretched over five months. *Id.* The  
 7 fact that this Settlement was negotiated at arms-length is inescapable.

8 **f. The Experience and Views of Counsel Favor**  
 9 **Final Approval**

10 The endorsement of qualified and well-informed counsel of the settlement as  
 11 fair is entitled to significant weight. *See Ellis v. Naval Air Rework Facility*, 87  
 12 F.R.D. 15, 18 (N.D. Cal. 1980). Class Counsel have over seven decades of collective  
 13 litigation experience, much of which has been devoted to consumer and employment  
 14 cases in the class action context. *See* Gaines Decl. at ¶¶ 2-5, 21, 34; Declaration of  
 15 Scott A. Miller at ¶¶ 2-4; Declaration of Daniel F. Gaines at ¶¶ 2-5; Declaration of  
 16 Steven L. Miller at ¶¶ 2-4.

17 Class Counsel support the Settlement as fair, adequate, reasonable, and in the  
 18 best interests of the Settlement Class as a whole. Class Counsel believe this  
 19 Settlement to be an excellent result for Settlement Class Members. *See* Gaines Decl.  
 20 at ¶ 6.

21 **g. The Presence of a Governmental Participant**

22 There is no governmental participant here; this factor does not apply.

23 **h. Class Members' Positive Reaction to the Settlement**  
 24 **Favors Final Approval**

25 Finally, and perhaps most importantly, courts examine the reaction of Class  
 26 Members to determine if a settlement that directly affects their interests should be  
 27 approved as fair, adequate, and reasonable. Through July 19, 2011, 8,006 Class  
 28 Members from California and 7,151 Class Members from Florida, Maryland,

1 Nevada and New Hampshire combined have filed claims. *See* Gaines Decl. at ¶ 23;  
 2 Keough Claims Decl. at ¶ 2. Only 32 Class Members have requested exclusion from  
 3 the Settlement. *Id.* at 3. Not one Class Member has yet objected to any of the  
 4 Settlement terms. *Id.* at 4.

5 The Court should construe the overwhelming non-opposition to and  
 6 participation in the Settlement as strong indicators of Class Members' support for the  
 7 Settlement as fair, adequate, and reasonable.

### 8 **C. Final Class Certification is Appropriate**

9 Before a court evaluates a settlement under Federal Rule of Civil Procedure  
 10 23(e), it must determine that the settlement class satisfies the requirements  
 11 enumerated under Rule 23(a) and at least one of the requirements in Rule 23(b). *Wal-*  
 12 *Mart Stores, Inc. v. Dukes*, \_\_ S. Ct. \_\_, 2011 WL 2437013 at \*5 (June 20, 2011).  
 13 The proposed Settlement Class meets all of the requirements of certification for  
 14 settlement purposes.

#### 15 **1. FRCP 23(a) Requirements For Class Certification Are Met**

16 Rule 23(a) provides the factors that the Court looks to for class certification:  
 17 (1) the class is so numerous that joinder of all members is impracticable; (2) there are  
 18 questions of law or fact common to the class; (3) the claims or defenses of the  
 19 representative parties are typical of the claims or defenses of the class; and (4) the  
 20 representative parties will fairly and adequately protect the interests of the class. Fed.  
 21 R. Civ. P. 23. These elements are satisfied here.

##### 22 **a. Numerosity**

23 If the class is sufficiently large that joinder of all members is impractical or that  
 24 individual joinder is impractical, the numerosity requirement is met. *See Cox v.*  
 25 *American Cast Iron Pipe*, 784 F.2d 1546, 1557 (11th Cir. 1986). It is estimated that  
 26 the class potentially contains upwards of one million members. Joinder of individual  
 27 claims is impractical here and the numerosity requirement is satisfied. Gaines Decl.  
 28 at ¶ 40.

**b. Commonality**

The commonality requirement of Rule 23(a) is met if there are common questions of fact and law among the class. *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class”); *see also Dunk, supra*, 48 Cal.App.4th at 1806-1807 (upholding the propriety of a nationwide settlement class with one class representative, despite objector’s assertions that “different laws in various states defeat the commonality of law requirement.”).

*Hanlon, supra*, 150 F.3d at 1019, explains that to demonstrate commonality, not all questions of fact and law need be the same. The existence of shared legal issues, even with divergent factual predicates or a common core of salient facts coupled with disparate legal remedies, will satisfy the commonality requirement. *Id.* Thus, although members of the proposed class may possess different avenues of redress, if their claims stem from the same source, then the commonality factor is satisfied.

Here, all the class members’ claims stem from identical conduct. Liability under the laws of California, Florida, Nevada, Maryland, and New Hampshire is triggered based on this identical conduct. The only difference is the amount and type of damages recoverable for the violation. This does not defeat commonality.

Under the terms of the proposed settlement, California class members are entitled to an amount up to \$5,000 each, while Class members residing in other states are entitled to up to \$1,000 each. This allocation reflects the minimum statutory damages recoverable under the statutes of each of the five states. “Such differences in settlement value do not, without more, demonstrate conflicting or antagonistic interests within the class.” *In re Pet Food Products Liability Litig.*, 629 F.3d 333, 346 (3d Cir. 2010). In fact, “varied relief among class with differing claims in class settlements is not unusual.” *Id.*; *see also Petrovic v. Amoco Oil Corp.*, 200 F.3d

1 1140, 1146 (8th Cir. 1999) (“[A]lmost every settlement will involve different awards  
 2 for various class members.”); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516,  
 3 530 (3d Cir. 2004) (“We agree with the District Court that the fact that there may be  
 4 variations in the rights and remedies available to injured class members under the  
 5 various laws of the fifty states in this matter does not defeat commonality and  
 6 predominance.”). *Cf. Hanlon, supra*, 150 F.3d at 1023-24 (“the idiosyncratic  
 7 differences between state consumer protection laws are not sufficiently substantive to  
 8 predominate over the shared claims”).

9 Under these circumstances, the commonality requirement is satisfied for  
 10 settlement purposes. *Hanlon, supra*, 150 F.3d at 1019-20; *see also Cox, supra*, 784  
 11 F.2d at 1557. Gaines Decl. at ¶ 41

### 12 c. Typicality

13 Typicality is met if the Named Plaintiff’s claims are typical of the class, though  
 14 “they need not be substantially identical.” *Hanlon, supra*, 150 F.3d at 1020. In *Gen.*  
 15 *Tel. Co. of the SW v. Falcon*, 457 U.S. 147, 158 n. 13 (1982), the U.S. Supreme Court  
 16 said:

17 The commonality and typicality requirements of Rule 23(a) tend to  
 18 merge. Both serve as guideposts for determining whether under the  
 19 particular circumstances maintenance of a class action is economical and  
 20 whether the named plaintiff’s claim and the class claims are so  
 21 interrelated that the interest of the class members will be fairly and  
 22 adequately protected in their absence. Those requirements therefore also  
 23 tend to merge with the adequacy of representation requirement, although  
 24 the latter requirement also raises concerns about the competency of class  
 25 counsel and conflicts of interest.

26 The Court in *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)  
 27 opined:

28 The purpose of the typicality requirement is to assure that the interest of  
 the named representative aligns with the interests of the  
 class....Typicality refers to the nature of the claim or defense of the class  
 representative, and not to the specific facts from which it arose or the  
 relief sought....The test of typicality is whether other members have the

1 same or similar injury, whether the action is based on conduct which is  
 2 not unique to the named plaintiffs, and whether other class members  
 3 have been injured by the same course of conduct (citations and internal  
 quotations omitted).

4 The claims for class members in Florida, Maryland, Nevada, and New  
 5 Hampshire are sufficiently co-extensive, as are the potential defenses to those claims,  
 6 such that Plaintiff's California claims are typical of the class. While there are  
 7 nuances in the various laws that are always subject to interpretation by the courts in  
 8 those jurisdictions, the general structure of claims and defenses in each state is  
 9 sufficiently similar to each other state; the laws are generally homogenous.

10 Plaintiff's renewed motion for preliminary approval of the class action  
 11 settlement (Docket No. 60) contains a comprehensive analysis of the similarities  
 12 among each of the five states' relevant privacy laws with respect to typicality;  
 13 Plaintiff incorporates the argument at pp. 12-17 of his renewed motion herein.

14 Based on the substantial similarities of these statutes, in terms of (1) the  
 15 conduct prohibited, (2) possible business exceptions, and (3) the availability of a  
 16 private cause of action and statutory damages, and the typical fact pattern which  
 17 underlies the claims of all Class Members, Plaintiff satisfies the typicality  
 18 requirement for settlement purposes here. Gaines Decl. at ¶ 42

#### 19 **d. Adequacy of Representation**

20 Rule 23(a)(4) requires that the Named Plaintiff and Class Counsel fairly and  
 21 adequately represent and protect the interests of the class. If the Named Plaintiff and  
 22 Class Counsel have no interests adverse to the interest of the proposed class members  
 23 and are committed to vigorously prosecuting the case on behalf of the class, then the  
 24 adequacy requirement is met. *Hanlon, supra*, 150 F.3d at 1020; *see also Griffin v.*  
 25 *Carlin*, 755 F.2d 1516 (11th Cir. 1985).

26 Over the course of nearly two years, the Named Plaintiff Kambiz  
 27 Batmanghelich and Class Counsel have expended countless hours in furtherance of  
 28

1 the Settlement Class' interests. Both Mr. Batmanghelich and Class Counsel have  
2 satisfied their fiduciary obligations to the Class in aggressively litigating this case,  
3 then effectively negotiating a very fair compromise of the claims alleged. Gaines  
4 Decl. at ¶¶ 42-43.

5 As addressed at the preliminary approval stage, Mr. Batmanghelich has no  
6 conflict of interest with non-California Class Members with respect to the  
7 settlement's payment allocation; it is reasonably based on the minimum potential  
8 recoveries available to class members from each of the five included states. *Id.*

9 In the Ninth Circuit, assessment of the adequacy of a plan of allocation in a  
10 class action is governed by the same standards of review applicable to the settlement  
11 as a whole - the plan must be fair, reasonable and adequate. *In re Omnivision*  
12 *Technologies, Inc., supra*, 559 F.Supp.2d at 1045; *Class Plaintiffs, supra*, 955 F.2d at  
13 1284. A plan of allocation that allocates "settlement funds to class members based on  
14 the extent of their injuries or the strength of their claims on the merits" is reasonable.  
15 *Ominivision, supra*, 559 F.Supp.2d at 1045. "An allocation formula need only have a  
16 reasonable, rational basis, particularly if recommended by experienced and competent  
17 class counsel." *In re Worldcom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y.  
18 2005).

19 Here, the Settlement's allocation of damages for Class Members from  
20 California at five times that of Class Members from Florida, Maryland, Nevada and  
21 New Hampshire is based on a reasoned and rational basis. The relevant California  
22 statute provides California residents with fixed statutory damages of \$5,000 while the  
23 statutes of Florida, Maryland, Nevada and New Hampshire provide for minimum  
24 statutory damages of \$1,000. The settlement payments are proportional to these  
25 minimum statutory damage awards. Class members have not suffered actual  
26 damages here, and most class members do not know, and without notice may never  
27 know, that their telephone calls were recorded.  
28

Moreover, Florida, Maryland, Nevada and New Hampshire each provide for identical levels of damages for violation of their respective recording statutes – the allocation of equal payments to Class Members from each of these states is fair and reasonable.

Mr. Batmanghelich is requesting a small service payment – \$10,000, for his significant time and efforts assisting Class Counsel with factual issues surrounding the case, and in exchange for his own share of the Settlement Amount. This award represents about one-tenth of one percent of the Common Fund, and therefore does not constitute a sufficient conflict of interest to foreclose fulfilling the adequacy requirement. *See* Stip. at ¶ 3.6; Gaines Decl. at ¶ 47.

Finally, Class Counsel, with more than seven decades of collective litigation experience, are competent and qualified to represent the Class. *See* Gaines Decl. at ¶¶ 2-5; Declaration of Scott A. Miller at ¶¶ 2-4; Declaration of Daniel F. Gaines at ¶¶ 2-5; Declaration of Steven L. Miller at ¶¶ 2-4.

## **2. FRCP 23(b)(3) Requirements for Class Certification are Met**

The Settlement Class also meets the requirements of Rule 23(b)(3) for settlement purposes because: 1) common questions predominate over questions that affect individual members; and 2) class resolution is superior to other available methods of adjudication. When assessing predominance and superiority, the Court may consider that the class will be certified for settlement purposes only. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618-20 (1997). A showing of manageability at trial is unnecessary; the dispositive inquiry at this stage is “whether the proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Id.* at 618-20, 623; *see also Hanlon, supra*, 150 F.3d at 1022.

### **a. Predominance**

In analyzing predominance, as with commonality, “[i]t is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions.” *Cox, supra*, 784 F.2d at 1557. The

1 claims of the Settlement Class are sufficiently cohesive; all Settlement Class  
 2 Members share a common nucleus of facts and potential legal remedies. As a result,  
 3 common questions of law and fact predominate. Gaines Decl. at ¶ 45.

#### 4 **b. Superiority**

5 Particularly in the settlement context, class resolution is superior to other  
 6 available methods for the fair and efficient adjudication of the controversy. *See*  
 7 *Hanlon, supra*, 150 F.3d at 1023. The superiority requirement involves a  
 8 “comparative evaluation of alternative mechanisms of dispute resolution.” *Id.* Here,  
 9 as in *Hanlon*, the alternative method of resolution is individual claims for relatively  
 10 small amounts of damages, proving uneconomical for potential plaintiffs because the  
 11 cost of litigation dwarfs potential recovery. *Id.*

12 Perhaps the most persuasive argument in favor of the superiority of class  
 13 treatment here is the surreptitiousness of the alleged violations by Defendants; were a  
 14 class not certified, many (if not all) Class Members would not bring claims for the  
 15 violations alleged, because few (if any) know their calls were recorded: Defendants’  
 16 alleged unlawful conduct, by its very nature, is secret in nature. As a result, class  
 17 treatment is a superior method for adjudicating these claims, and a class action is the  
 18 preferred method of resolution. Gaines Decl. at ¶ 46.

#### 19 **D. Defendants Have Provided Notice to the Attorney Generals** 20 **Pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715**

21 Because this case is before this Court under the Class Action Fairness Act, 28  
 22 U.S.C. § 1332(d), Defendants are required to notify “appropriate Federal and State  
 23 officials” of the Settlement. 28 U.S.C. § 1715.

24 Defendants notified the required officials on February 18, 2011. *See* Docket  
 25 No. 68.

26 28 U.S.C. § 1715(d) provides that “[a]n order giving final approval of a  
 27 proposed settlement may not be issued earlier than 90 days after the later of the dates  
 28 on which the appropriate Federal official and the appropriate State official are served

1 with the notice....” 28 U.S.C. § 1715(d).

2 More than 90 days have passed since notice was provided and the Parties have  
3 received no objections (or any other response) from any State or Federal officials.  
4 Gaines Decl. at ¶ 68. As such, the Settlement may be finally approved by the Court.

5 **VI. CONCLUSION**

6 For all the foregoing reasons, Plaintiff requests that the Court grant final  
7 approval of the Settlement and approve distribution of the Settlement funds as set  
8 forth in the Stipulation.

9  
10 DATED: July 22, 2011

Respectfully submitted,

11 GAINES & GAINES,  
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